

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

HARVEY PATRICK SHORT,

Petitioner,

v.

Case No. 2:10-cv-00786

WILLIAM M. FOX, Warden,  
St. Mary's Correctional Center,

Respondent.

PROPOSED FINDINGS AND RECOMMENDATION

On June 3, 2010, the Clerk's Office received a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 (docket # 1), filed by Harvey Patrick Short (hereinafter "Petitioner"). This matter is assigned to the Honorable Joseph R. Goodwin, Chief United States District Judge, and it is referred to the undersigned United States Magistrate Judge for submission of proposed findings and a recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B).

On March 31, 2008, Petitioner was convicted in the Circuit Court of Kanawha County of Second Degree Robbery. (# 1 at 1). On January 15, 2009, Petitioner was sentenced to 5 to 18 years on the Second Degree Robbery charge. (Id.) He has been released from imprisonment.

According to the Clerk of the Supreme Court of Appeals of West Virginia, Petitioner filed a Petition for Appeal on June 1, 2009.

(State v. Short, No. 090814). According to the Clerk, the Petition for Appeal was refused on October 8, 2009. He did not file a petition for a writ of certiorari with the Supreme Court of the United States.

Petitioner filed a Petition for a Writ of Habeas Corpus in the Circuit Court of Kanawha County on June 4, 2009.<sup>1</sup> It appears that no ruling has been entered in Petitioner's state habeas proceeding. Because Petitioner's state habeas proceedings are on-going, he has not properly exhausted his state court remedies, the claims contained in his section 2254 petition are unexhausted, and his section 2254 petition is premature. Accordingly, it must be dismissed without prejudice.

The applicable statutes and case law relating to exhaustion of state remedies were explained to Petitioner in Proposed Findings and Recommendation filed in Short v. Hoke, 2:09-cv-01097 (S.D. W. Va. Oct. 26, 2009, # 5). Petitioner filed objections which were overruled. Id. ## 14, 15 (Faber, J.). Petitioner's appeal was dismissed by the Fourth Circuit. Short v. Hoke, No. 10-6922 (4th Cir. Dec. 7, 2010).

The undersigned proposes that the presiding District Judge **FIND** that Petitioner's section 2254 petition is premature and that

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<sup>1</sup> Petitioner lists June 1, 2009 as the date of filing of this petition. However, the undersigned's staff has confirmed that the state habeas petition was docketed by the Circuit Clerk on June 4, 2009.

the claims contained therein are unexhausted. Accordingly, it is respectfully **RECOMMENDED** that the presiding District Judge **DISMISS** Petitioner's section 2254 petition (# 1), without prejudice.

Petitioner is notified that this "Proposed Findings and Recommendation" is hereby **FILED**, and a copy will be submitted to the Honorable Joseph R. Goodwin, Chief United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, Petitioner shall have fourteen days (filing of objections) and three days (mailing) from the date of filing this "Proposed Findings and Recommendation" within which to file with the Clerk of this Court, specific written objections, identifying the portions of the "Proposed Findings and Recommendation" to which objection is made, and the basis of such objection. Extension of this time period may be granted by the presiding District Judge for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to Chief Judge Goodwin.

The Clerk is directed to file this "Proposed Findings and Recommendation" and to mail a copy of the same to Petitioner.

January 18, 2011  
Date

Mary E. Stanley  
Mary E. Stanley  
United States Magistrate Judge